Supreme Court, U.S.
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No. 09-809

IN THE

Supreme Court of the United States

THOMAS A. EAMES, ROBERTA L. EAMES
and TAMMY EAMES,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

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Rule:

Federal Rule of Civil Procedure 9(b) ..... *passim*

In its opposition brief, Nationwide Mutual Insurance Company argues five essential points. First, Nationwide says that review should be denied because the decision below is unpublished, and was designated by the Third Circuit as "not precedential." As shown below, this is irrelevant. *Cf. Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) (stating that a Court of Appeals' determination to withhold publication "carries no weight in our decision to review the case.")

Second, Nationwide says that the decision below "announced" no rule of law; though it concedes that the decision indisputably ***applied*** a rule of law (namely, Federal Rule of Civil Procedure 9(b)).

Third, Nationwide argues that though a conflict may exist among the Courts of Appeals with respect to the pleading standards for negligent misrepresentation claims, the Eames plaintiffs pled no such claims % not even in the alternative, and despite having pled claims that are (as Nationwide concedes) provable on a mere showing of negligent misrepresentation. *See Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (confirming that "a negligent misrepresentation is sufficient to violate" the Delaware Consumer Fraud Act).

Fourth, Nationwide claims that the case was dismissed below not just for some perceived failure of pleading, but also on the merits. As demonstrated below, this argument contradicts Nationwide's position before the Third Circuit, where it argued that the Magistrate Judge stayed within the bounds of the district court's referral precisely because he did ***not*** decide the merits.

See 13a (recounting Nationwide's argument that the Magistrate Judge did not "improperly revisit[]" the merits because "the Magistrate Judge's dismissal is framed in the context of Rule 9(b).")

Finally, Nationwide says that the scope of Delaware's analog to Rule 9(b) remains unsettled under Delaware law. This, it suggests, somehow transforms the instant petition into a referendum on state procedural standards. But the decision below applied the federal rule, not any state law analog, to the Eames plaintiffs' pleading; and the issue is whether the (highly unsettled) scope of the federal rule should be finally settled by this Court. The petition thus raises no state law claims.[1]

* * *

The language of Rule 9(b) is plain and straightforward. The cases collected in the petition are not. Because the rule should be applied uniformly throughout the federal courts, this Court should settle the matter.

I.

PUBLICATION *VEL NON* IS IRRELEVANT

Nationwide's lead argument % and as such, the argument that Nationwide apparently regards as its strongest % is that the decision below is unpublished, and was designated by the Third Circuit as "not

[1] The fact that a respected state bench may be struggling with the same procedural issue that has given rise to conflicts among the Courts of Appeals may not be surprising; but it does not alter the purely federal character of the questions presented by this petition.

precedential." Neither circumstance militates against review:

> We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals [erred] regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.

Commissioner of Internal Revenue v. McCoy, 484 U.S. 3, 7 (1987) (granting *certiorari*).

It is likewise recognized that unpublished opinions are no less binding on the parties than published opinions; and that unpublished opinions are not without effect in shaping the law:

> The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.

Smith v. United States, 502 U.S. 1017, 1020 n. (1991) (Blackmun, J., dissenting).

In short, the Third Circuit's (purely) administrative decision to withhold publication is irrelevant to this Court's decision to review.

II.

THE DECISION BELOW SHOULD NOT ESCAPE REVIEW MERELY BECAUSE IT ADOPTED (RATHER THAN RESTATING) THE DISTRICT COURT'S HOLDING

Nationwide says that because the decision below "announced" no rule of law, review should be denied. Yet the Third Circuit clearly referred to the district court's "holding that the pleadings failed to satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b)." 2a. It just as clearly affirmed that holding "substantially for the reasons set forth by" the district court. 6a. If (as we contend) the scope of Rule 9(b) is a fit subject for this Court's review, it should not escape review merely because the Third Circuit chose to adopt the district court's holding rather than restating it.

III.

UNDER SETTLED PLEADING STANDARDS, THE EAMES PLAINTIFFS PLED NEGLIGENT MISREPRESENTATION

Nationwide concedes, at least tacitly, that a conflict does exist amongst the Courts of Appeals with respect to the applicability of Rule 9(b) to claims of negligent misrepresentation. Opposition at 1(acknowledging that "certain federal courts do not apply the particularity required by Rule 9(b) to negligent misrepresentation

claims . . . .")[2] Nationwide simply denies that the Eames plaintiffs ever pled negligent misrepresentation.

To prove its point, Nationwide emphasizes selected phrases from the Eames plaintiffs' amended complaint that demonstrate (according to Nationwide) that the Eames plaintiffs failed to plead negligent misrepresentation under the Delaware Consumer Fraud Act ("DCFA"). With a single exception – the allegation that Nationwide's conduct was "purposefully misleading" – all the phrases emphasized by Nationwide (that Nationwide "has misrepresented" facts to consumers, that it has "falsely described" those facts, etc.) are consistent with a DCFA pleading.[3]

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[2] *Compare Tricontinental Indus., Ltd. v. Pricewaterhouse Coopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007), *cert. denied*, 552 U.S. 824 (2007) (claim for negligent misrepresentation "is ***not*** governed by the heightened pleading standard of Rule 9(b)") (emphasis in original) *and Baltimore County v. CIGNA Healthcare*, No. 06-1877, 2007 WL 1655461, slip op. at *6 (4th Cir. June 5, 2007) (holding that "a claim of negligent misrepresentation under Maryland law does not contain an essential showing of fraud and thus the heightened pleading standard requirements of Rule 9(b) do not apply") *with North American Catholic Educ. Found., Inc. v. Cardinale*, 567 F.3d 8, 15 (1st Cir. 2009) (though "one might think that negligent misrepresentation and fiduciary duty were not on their face subject to Rule 9(b) . . . the case law here and in other circuits reads Rule 9(b) expansively to cover associated claims where the core allegations effectively charge fraud.")

[3] Remarking on the differences between the DCFA and common law fraud % and the simplicity of the former's legal elements % Delaware's Chancery Court has observed:

(Cont'd)

Nationwide does not dispute (nor can it dispute) that a mere negligent misrepresentation is sufficient to support a DCFA claim. *Stephenson*, 462 A.2d at 1074. Nor can it dispute that the amended complaint expressly pled a DCFA count. Its logic must therefore be that when a complaint sets forth all the elements of a particular legal theory, and even contains a dedicated count for that theory, the presence in the complaint of a single "surplus" allegation serves to abandon the legal theory altogether. This proposition is so contrary to modern standards of pleading, and to the liberal construction to which a plaintiff's complaint is traditionally entitled, as to require no answer.

In sum, there is no dispute that the Eames plaintiff's amended complaint alleged all the elements

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(Cont'd)

> To establish a claim under the CFA . . . a plaintiff need only prove:
>
> [t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby.
>
> Thus, the two actions are quite distinct. Scienter, intent to induce action, reliance, and damages are conspicuously missing from the elements of the CFA.

State v. Publishers Clearing House, 787 A.2d 111, 116 (Del. Ch. 2001).

of a DCFA claim, and even labeled them as such. Nor is there any dispute that this claim is provable on a mere showing of negligent misrepresentation. Nationwide's insistence that no claim for negligent misrepresentation is subsumed by the pleadings – the point on which its opposition to the petition ultimately rests – is demonstrably wrong.[4]

IV.

THE CASE WAS DISMISSED ON RULE 9(B) GROUNDS, NOT ON GROUNDS OF STATE SUBSTANTIVE LAW

Nationwide asserts, without citation to the record, that the Magistrate Judge "alternatively ruled on the sufficiency of Petitioners' state law claims." Opp. at 14. In fact, Nationwide understood that if the Magistrate Judge were perceived to have ruled on the merits, he would have exceeded the scope of his referral. Nationwide thus argued successfully to the district court that the entirety of the Magistrate Judge's recommendation was "framed in the context of" Rule 9(b):

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[4] Equally wrong is Nationwide's assertion that the Eames plaintiffs avoided allegations of negligence to "strengthen" their claim for punitive damages. Under Delaware law, punitive damages for negligence are available only on a showing of outrageous, willful or wanton conduct % hardly an easy showing, and no different substantively from the standard that Nationwide cites in connection with the DCFA. *See Jardel v. Hughes*, 523 A.2d 518, 529 (Del. 1987) (requiring outrageous, willful or wanton conduct for imposition of punitive damages on negligence claims).

> Plaintiffs' primary objection to the Report and Recommendation is that, despite [the predecessor judge's] prior determination that Plaintiffs alleged misrepresentation sufficient to withstand dismissal under Rule 12(b)(6), the Magistrate Judge improperly revisited this subject, even though it was not briefed anew in Nationwide's second Motion to Dismiss. * * *
>
> Nationwide contends that the Magistrate Judge's decision is not inconsistent with prior rulings by [the predecessor judge] in the case, because the Magistrate Judge's dismissal is framed in the context of Rule 9(b).
>
> * * *
>
> Although the Magistrate Judge's Report and Recommendations can be read as holding that Plaintiffs failed to plead a misrepresentation in the first instance, it appears to the Court that the Magistrate Judge's determination that there was no actionable misrepresentation was also made within the context and requirements of Rule 9(b).

13a, 15a.

Nationwide thus prevailed below by arguing that the Magistrate Judge ruled solely within the context of Rule 9(b), and did not improperly tinker with the merits. It now argues before this Court that review should be

denied because the Magistrate Judge affirmatively decided the merits (so that review of procedural issues would constitute an advisory opinion).

In any event, the district court's affirmance of the Magistrate Judge's recommendation sets forth no discussion of the merits whatever, and rests entirely on Rule 9(b) grounds. The case was thus dismissed in the district court, and the dismissal was affirmed in the Third Circuit, because the courts below insisted on applying Rule 9(b)'s particularity requirement to a claim not enumerated within the rule, and which is provable on a showing of negligence. Whether Rule 9(b) so applies is (as shown by the cases collected in the petition) an important an unsettled question, deserving of review.

V.

THE DELAWARE COURTS' CONFLICTING AND UNCERTAIN TREATMENT OF RULE 9(B), WHILE INTERESTING, DOES NOT TRANSFORM THE QUESTIONS PRESENTED INTO MATTERS OF STATE PROCEDURAL LAW

In *State v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001), Delaware's Chancery Court rejected any particularity requirement for DCFA claims based on the statute's origins, legal elements and purpose. *Publishers Clearing House*, 787 A.2d at 114-17. Nationwide says that the Delaware court's analysis should apply only to pleadings filed by the state's Attorney General – despite the DCFA's express creation of a private right of action for consumers, and as though different pleading standards could properly apply based on the pleader's identity.

But this is beside the point. Although the Eames plaintiffs' claims on the merits are state law claims, the case was dismissed (consistent with the familiar *Erie* doctrine) for a perceived failure of pleading under Federal Rule of Civil Procedure 9(b) — not under any state procedural rule. The need for review arises not from matters of state law, but from the lack of uniformity in the federal courts' application of Rule 9(b). *See Sotelo v. DirectRevenue, LLC*, 384 F. Supp.2d 1219, 1233-34 (N.D. Ill. 2005) (holding that the Illinois Consumer Fraud Act, which is substantially identical to the DCFA, "is not subject to the heightened pleading [standard] of Rule 9(b).")

Sotelo thus presents the same problem of which the Eames plaintiffs complained in the petition. Had they been able to file suit in the Northern District of Illinois, their complaint would not have been dismissed. Because it was filed in the District of Delaware, it was dismissed. This (purely procedural) anomaly warrants review.

CONCLUSION

For the reasons stated above, and for the reasons set forth in the Eames plaintiffs' petition, the Eames plaintiffs respectfully request that writ of *certiorari* be allowed.

Respectfully submitted,

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